

Entered on Docket
November 14, 2005
GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed: November 10, 2005


LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 04-41044 T
QMECT, INC., etc., Chapter 11

Debtor-in-Possession.

In re No. 04-46443 T
FRED AND LINDA KOELLING, Chapter 11

Debtors-in-Possession.

QMECT, INC., etc., A.P. No. 04-4190 AT
Plaintiff, A.P. No. 04-4365 AT
A.P. No. 04-4366 AT

vs. (Consolidated)

BURLINGAME CAPITAL PARTNERS II,
L.P., etc. et al.,

Defendants.

AND RELATED ADVERSARY PROCEEDINGS

1 **MEMORANDUM OF DECISION RE ADMISSIBILITY OF DOCUMENTS**

2 The Court directed the parties to file briefs addressing the
3 admissibility of two documents: (1) the Comerica Bank Loan
4 Interest and Principal Statement (the "Comerica Statement") and
5 (2) the Qmect Trial Balance as of February 26, 2004 (the "Qmect
6 Trial Balance"). Both parties filed briefs. Burlingame Capital
7 Partners II, L.P. and Electrochem Funding, LLC (collectively
8 "Burlingame") filed an unauthorized reply brief. The above-
9 captioned debtors-in-possession (the "Debtors") filed a motion to
10 strike the reply brief, to which Burlingame responded. The Court
11 has reviewed all of the filings and concludes as follows:

12 1. The motion to strike Burlingame's reply brief will be
13 granted. The reply brief was not authorized and was not warranted
14 by the circumstances without authorization.

15 2. The testimony of David Ferree was inadequate to establish
16 a foundation for admissibility of the Comerica Statement as a
17 business record. His testimony clearly indicated that he had no
18 personal knowledge of how this document was prepared. The
19 deficiency does not lie with the fact that he was not responsible
20 for the account until just prior to the completion of the sale of
21 the Qmect loans to Burlingame. The deficiency lies with the fact
22 that the document was prepared and maintained in a different
23 location and that he has no direct knowledge of the procedures
24 followed by that office in preparing and maintaining the document.
25 His designation by Comerica as a custodian of records does not
26 cure that deficiency. However, the Court will admit the document

under FRE 807. Credible testimony was presented that this is a document upon which Comerica relied in connection with its own business operations. The Court concludes that this is a sufficient guaranty of its trustworthiness to justify its admission into evidence. The lack of any direct evidence of how the document was prepared will be taken into account in the weight to be accorded it.

3. The Court also concludes that a sufficient foundation has not been established for admitting the Qmect Trial Balance into evidence as a business record. However, the Court will admit the Qmect Trial Balance into evidence as an admission subject to a motion to strike if later testimony establishes that its admission was improvident.

Good cause appearing therefor, it is

SO ORDERED.

END OF DOCUMENT

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